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NO. 88.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1933.

UNITED STATES OF AMERICA, Petitioner,

vs.

HARRY MURDOCK, Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT.

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BRIEF FOR THE RESPONDENT.

STATEMENT OF FACTS.

Respondent was convicted in the District Court of the United States for the Southern District of Illinois of the offense of willfully failing to give testimony and supply information when he appeared before an internal revenue agent and was placed under oath and interrogated. The first count of the indictment charged him with a willful

violation of Section 1114 (A) of the Revenue Act of 1926 (U. S. C. A., Title 26, Section 1256). The second count charged him with a willful violation of Section 146 (A) of the Internal Revenue Act of 1928 (U. S. C. A., Title 26, Section 2146). Section 146 (A) of the 1928 Act is identical with Section 1114 (A) of the 1926 Act excepting that the word "Title" is substituted for "Act" in the two instances in which the latter word is used in the 1926 law. Each of these sections reads as follows:

> "Any person required under this Act (Title) to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purpose of the computation, assessment or collection of any tax imposed by this Act (Title), who willfully fails to pay such tax, make such return, keep such records or supply such information at the time or times required by law or regulations, shall, in addition to all penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than one year, or both, together with the costs of prosecution."

The applicable sections of the revenue acts involved in this prosecution are set forth in an appendix which follows this brief.

THE INDICTMENT.

After alleging that throughout the year 1927 respondent was a citizen of the United States, residing within the

Eighth Internal Revenue Collection District of Illinois, and that he made and filed his income tax return for that year with the Collector of Internal Revenue of said district, and that, in said return, he understated his total receipts for said year by the sum of $12,000, and claimed that said sum had been paid by him to a person or persons unknown to the grand jurors, the first count of the indictment alleged that on December 23, 1929, in pursuance of a written designation of Robert H. Lucas, Commissioner of Internal Revenue for the United States of America, giving him authority so to do, John R. Kirk, United States Internal Revenue Agent in charge at Springfield, Illinois, issued a written summons to respondent which was regularly served personally on him on December 27, 1929, requiring him to appear before the said United States Revenue Agent at Springfield, Illinois, on December 30, 1929, to give testimony and supply information for and to said Commissioner concerning said payment of said moneys; that respondent did appear in response to said summons, and that he then and there "did willfully fail to give such testimony and supply such information."

The second count is almost identical with count 1 excepting that it refers to respondent's income-tax return for the year 1928.

THE SENTENCE.

The respondent was found guilty and was sentenced to serve a year in jail and to pay a fine of $5,000 (R. 14).

From this conviction he appealed to the United States Circuit Court of Appeals for the Seventh Circuit. The Court of Appeals reversed the judgment and remanded the cause for a retrial.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals in this case is reported in 62 F. (2nd) 926.

SUMMARY OF OPINION OF COURT OF APPEALS.

The District Court charged the jury, in part, as follows: "The Court feels from the evidence that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt" (R. 66). Counsel for respondent excepted to this part of the charge as being an "unfair and an unreasonable usurpation of the province of the jury" (R. 67), and upon the appeal respondent assigned the giving of this part of the charge as error" (R. 75).

Concerning this assignment of error the Court of Appeals said in its opinion: "While it is within the power of the Court to express an opinion as to the guilt of the accused, we doubt the wisdom of so doing, save in extraordinary cases. It is true the trial court has an important duty to perform in assisting the jury to arrive at a true verdict. There is, however, in practical operation, we

fear, considerable danger of the Court's substituting its opinion for that of the jury by such an expression of opinion. It would seem the better practice to comment upon the character of the evidence, and if when an opinion is expressed, to limit it to a basic fact, or an issue involved, upon which the guilt of the accused is, in part, dependent. By so doing the jury is left to perform its constitutional duty of determining the guilt or innocence of the accused, and at the same time the Court fully meets its very important duty of assisting the jury in reaching an intelligent verdict" (62 F. [2nd] 926):

At the conclusion of the charge counsel for respondent requested the Court to give this instruction: "The defendant also suggests and asks the Court to give an instruction to the effect that if you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, that you should consider that in determining whether or not his refusal to answer the questions was willful" (R. 67). The Court refused this request. Respondent excepted to the ruling of the Court (R. 67) and assigned it as error upon the appeal (R. 75). Concerning this assignment the Court of Appeals said in its opinion: "The request was a fair one in view of the testimony and the failure of the Court, in any other part of the charge, to speak of this phase of the case." There was evidence tending to show that appellant's refusal to testify was caused by his belief that it would be self-incriminating.

The colloquy or argument which occurred between the opposing counsel before he made this statement informed him that his right so to do was at least debatable. The precise question, which was one of law, was whether the protection of the Fifth Amendment extended to self-incrimination against the operation of a state criminal statute. In the late case of U. S. ex rel. Vaj'tauer v. Commissioner of Immigration, 273 U. S. 103, the Supreme Court expressly avoided a ruling on that question. Not until this case reached the Supreme Court was it settled "that full and complete immunity against prosecution by the Government compelling the witness to answer is equivalent to the protection furnished by the rule against self-incrimination."

The accused, when he refused to testify, had just heard his counsel assert that his protection under the Fifth Amendment extended to self-incriminating statements, even though the incrimination arose out of a state criminal statute. He therefore was within his rights in asking that the jury be charged as requested. True, the jury was not obliged to accept as true his explanation of his refusal to testify, for advice of counsel on such a question is not an absolute defense. A license to practice law does not carry with it the power to grant immunity to one not entitled to it. On the other hand, the issue of willfulness is ordinarily one of fact. Willfulness has been defined to mean something more than knowingly (Felton v. U. S., 96 U. S. 703; Spurr v. U. S., 175 U. S. 734).

The good faith, belief in advice given by counsel may, and ordinarily will, have a bearing upon the willfulness of the conduct of a party who followed it. Without advice of counsel even, a witness may claim the protection of the Fifth Amendment. Whether his asserted claim of protection is in good faith may be disputed, but a jury question is frequently thereby raised. At least in criminal cases, where willfulness of the accused's conduct is the fact issue, determinative of guilt, and the Court has expressed its opinion that the accused is guilty, the accused is entitled to an instruction which directs the jury's attention to his evidence on that issue" (62 F. [2nd] 926).

THE EVIDENCE.

As heretofore stated, each count of the indictment charged respondent with WILLFUL failure to supply information on a specific occasion when he appeared before the Internal Revenue Agent in response to a summons.

The prosecution offered Internal Revenue Agents A. R. Waterbury (R. 37) and Mathew S. Keyes (R. 41) to prove that respondent met them voluntarily, and not in response to a summons or other legal mandate, at East St. Louis, Illinois, on September 19, 1929, and had a conversation with them concerning his income tax returns for 1927 and 1928 (R. 37 and 38, 41 and 42). It was shown by the testimony of these witnesses that they asked respondent to tell them about the heretofore mentioned deductions shown in respondent's income tax returns for the years 1927 and

1928, and that he refused to give them the information which they requested.

Counsel for respondent objected to this testimony upon the ground that it was "wholly immaterial to the charge in this indictment" (R. 37), and because the defendant was indicted for refusing to give information at a certain specified time and place, to an officer designated by the Commissioner of Internal Revenue, and because he was "prepared to answer that charge but was not prepared to defend the charge of refusal to give information in September, 1929, to an entirely different person than the person named in the indictment, a person not shown to have been designated by the Internal Revenue Commissioner, as stated in the indictment" (R. 38).

The Court overrruled these objections and respondent was allowed an exception (R. 37 and 38).

In reply to the objection then and there offered by counsel for respondent, the District Attorney attempted to justify this testimony in these words: "There is a question of willfulness here and that is why I think it is material" (R. 38).

Following the ruling of the Court upon the objections to the testimony, counsel for respondent then asked the Court to withdraw a juror and continue the case, because of the injection of this testimony "that the defendant considers immaterial, and that he is in nowise apprised of by the indictment, and that he could not in any way anticipate and prepare for," and which "requires the pres-

ence here as a witness for the defendant of this Mr. Kreipke, that this witness mentions" (R. 39).

The Court overruled this motion, but allowed respondent an exception (R. 40).

The prosecution then introduced in evidence a correct transcript of the proceedings before Internal Revenue Agent Kirk, on January 9, 1930, when respondent appeared and testified under oath, in response to a summons that had been duly served upon him. This transcript, which appears in the record beginning at page 49, shows that respondent was represented by a Mr. Moore, an attorney. After respondent was sworn, but before he testified, the record shows that a conversation occurred in the hearing and presence of respondent between Mr. Moore, Internal Revenue Agent Kirk and a Mr. Green, attorney for the Internal Revenue Department. In this conversation Mr. Moore stated that if there was any question about the deductions that had been made by respondent from his income for the years 1927 and 1928, as shown by his sworn returns, respondent was ready to pay the tax upon same. Mr. Moore also stated that respondent was ready to supply information, but that he could not answer some questions that might be asked of him "without tending to incriminate and degrade himself" (R. 52).

The attorney representing the Internal Revenue Department then asked Mr. Moore whether he had in mind a criminal prosecution under state law or under federal law, to which Mr. Moore replied: "I doubt if they have

a right to require me to point out which particular law he might put himself liable, to a state law or a federal law, or whether it might be both" (R. 52).

After asserting that he did not believe the Internal Revenue Agent could lawfully require him to specify whether the fear of incrimination was of a prosecution for violation of a federal law or state law, Mr. Moore said: "I think I would state that we have particularly in mind a state law" (R. 53).

After respondent had answered several questions propounded by the attorney representing the Internal Revenue Agent, he was asked this question: "Has that been your only business?" He replied, "I refuse to answer." He was asked, "On what ground?" He replied, "On the ground that I might give information that might incriminate and degrade myself" (R. 56). In asserting this claim of his constitutional privilege against being required to give self-incriminating testimony, respondent did not limit his claim to fear of prosecution under a state law or a federal law, but he made the claim sufficiently broad and comprehensive to cover both.

The attorney for the Internal Revenue Agent then asked him: "Do you have in mind the violation of a federal law or state law when you state your ground is that you might give information to incriminate or degrade yourself?" He replied: "Against a state law." The attorney then asked: "And not against a federal law?" To this he answered: "Not that I know of" (R. 56).

Respondent refused to answer fourteen of the questions which were asked of him. In each instance he stated that he refused to answer because his answers might incriminate him.

An examination of these questions clearly shows that his fear that his answers might incriminate him was not imagined or frivolous. It is apparent that his refusal to answer was based upon a well-founded fear of self-incrimination. This is evidenced by such questions as the following: "Mr. Murdock, are you at the present time operating any slot machines without the consent of public officials?" (R. 57). "Did you in 1928 operate slot machines without the consent of public officials?" (R. 57).

HISTORY OF THIS LITIGATION.

Respondent was indicted on January 23, 1930 (R. 7). He interposed several sworn written pleas in bar to the indictment. In these pleas he alleged that his failure to answer questions was not a willful failure or refusal, but that it was caused by his belief that his answers would incriminate him. The District Court sustained one of these pleas and entered judgment in favor of defendant and in bar of the prosecution. The opinion of the District Court is reported at 51 Fed. (2nd) 389. The Government appealed to this Court, and the decision of the District Court was reversed. The opinion of this Honorable Court appears at 284 U. S.

Upon the case being redocketed in the District Court respondent was convicted, as hereinbefore stated.

QUESTION PRESENTED.

Counsel for petitioner in their petition for the writ of certiorari, state that the question here presented is: "Whether a witness at a hearing authorized by Section 1104 of the Revenue Act of 1926, as amended by Section 618 of the Revenue Act of 1928, is immune from prosecution under Section 146 (A) of the Revenue Act of 1928, for refusal to answer questions properly propounded to him if he acted in good faith and under an actual but erroneous belief that he was not required to answer (Petitioner's Petition, p. 2).

This is not the precise question presented by this appeal. There are two questions presented and they are:

(1) Did the Circuit Court of Appeals correctly hold that the District Court committed reversible error in instructing the jury as follows: "The Court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt" (R. 66).

(2) Did the Circuit Court of Appeals correctly hold that the District Court committed reversible error in refusing to give the following instruction requested by respondent:

"The defendant also suggests and asks the Court to give an instruction to the effect that if you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, that you should consider that in determining whether or not his refusal to answer the questions was willful" (R. 67).

BRIEF OF AUTHORITIES.

I.

Willfulness, as used in a criminal statute, means the doing or omitting to do a thing knowingly and willfully. It implies not only a knowledge of the thing, but a determination with a bad intention to omit doing it.

Potter v. U. S., 155 U. S. 438, at 446;
Felton v. U. S., 96 U. S. 699, at 702;
Spurr v. U. S., 174 U. S. 734;
Murdock v. U. S., 62 Fed. (2nd) 926.

II.

Willfulness has frequently been defined as signifying an evil intent without justifiable excuse. It means not merely voluntarily, but with a bad purpose.

1 Bishop, Crim. Law, Sec. 428;
Comm. v. Kneeland, 20 Pick. 220.

III.

Where willfulness is the vital element of the criminal offense charged in the indictment, the accused is entitled to introduce evidence tending to show that his act was done in good faith and under the honest belief that it would not constitute a violation of law. This evidence is

admissible in order to refute the allegation that the defendant's conduct was willful. For the same reason the accused is entitled to an instruction enlightening the jury upon the subject of willfulness and advising the jury that it should consider the good faith or honest belief, if any, of the defendant, in determining whether his conduct was willful.

Potter v. U. S., 155 U. S. 446.

IV.

Whether guilty or innocent, the defendant has the right to a fair and impartial trial. He is entitled to have the jury properly and correctly instructed upon the law. The law does not provide one method for trying innocent persons and another for trying guilty persons.

People v. Garines, 314 Ill. 413;
People v. Gardner, 203 Ill. 204;
People v. Newman, 261 Ill. 11.

V.

The trial court should not instruct the jury that the Court believes the defendant has been proved guilty, by the evidence, beyond any reasonable doubt. The giving of such an instruction in effect substitutes the judgment of the Court for that of the jury, and takes from the jury its lawful function of deciding the facts in the case. It also

takes from the defendant his constitutional right to a trial by jury.

Murdock v. U. S., 62 Fed. (2nd) 926).

VI.

The statute under which Harry Sinclair was prosecuted was not similar to the statute involved in this proceeding. Willfulness was not one of the necessary elements of the offense with which Sinclair was charged. Mere refusal to testify before the Senate Committee constituted the offense. What is said by this Honorable Court in the decision of the Sinclair case is in no way pertinent to the facts of this case.

Sinclair v. U. S., 279 U. S. 263.

SUMMARY OF ARGUMENT.

The burden was cast upon the prosecution at the trial to prove that respondent "willfully" failed to give testimony and supply information. The question of whether respondent's refusal to answer certain questions amounted to a willful violation of the statute was one of the important fact issues in the case.

Omitting to do a thing "willfully" implies not only a knowledge of the thing, but a determination, with a bad intention, to omit doing it.

Because the question of whether respondent's refusal to answer questions constituted a willful violation of the statute was of the essence of the accusation, respondent was entitled to have the jury instructed upon the subject of willfulness and also upon the subject of his good faith in refusing to answer. If respondent refused to answer certain questions because he honestly believed, in good faith, that his answers would incriminate him, the jury should have been instructed to consider that fact in determining whether respondent's conduct constituted a willful violation of law.

The trial court committed reversible error in refusing respondent's request to charge the jury as follows: "If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in

determining whether or not his refusal to answer the questions was willful."

Although respondent was entitled to the requested instruction on the subject of good faith, the jury was not obliged to accept as true his explanation of his refusal to testify.

Respondent cannot be charged with ignorance of the law because he based his refusal to answer upon an asserted claim that his answers would incriminate him in a state law. At the time he made this claim the question of whether a person testifying in a federal proceeding might claim immunity from supplying information because his answers might incriminate him in a state court had not been definitely decided, and the decisions of this Honorable Court were in conflict. It was not until the decision of this case by this Court, reported in 284 U. S. 141, that it was authoritatively and finally decided that a claim of privilege from answering because of danger of self-incrimination in a state court may not be raised by one testifying in a federal investigation.

The case of Sinclair v. U. S., 279 U. S. 263, relied upon by the prosecution, is not applicable. Willfulness was not an element of the offenses defined by the statute under which Mr. Sinclair was prosecuted. Mere refusal to answer constituted the offense in that case, and it was immaterial whether the refusal was willful or otherwise.

At the trial counsel representing the prosecution admitted that the burden was cast upon the prosecution to prove that respondent's refusal to testify was willful.

The trial court should not have told the jury, in the charge, that: "The Court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt." The effect of the giving of this instruction was for the Court to substitute itself for the jury, and to take from the jury the determination of the fact issue of whether respondent's conduct constituted a willful violation of the statute.

ARGUMENT.

The statute under which respondent is prosecuted does not make every failure to supply information a violation of law. It is only when one "willfully" fails to supply such information that he may be punished.

The record of this case shows that respondent refused to answer certain questions that were asked of him because he believed that his answers would incriminate him. It is true that, when pressed to state whether he feared a criminal prosecution under a state or federal law, he specified the state law, but this is immaterial in arriving at a decision as to whether his refusal was willful. Although it is the law, as announced by this Court in this case (284 U. S. 141), that a witness in a federal investigation cannot invoke the protection of the Fifth Amendment to save him from a possible criminal prosecution in a state court, and although it is also true that ignorance of the law is not an available defense to one accused of crime, these facts are in no way determinative of whether the refusal of respondent to answer certain questions was willful or based upon good faith and an honest, but ill-founded belief.

This case does not come within that class of statutory offenses which become offenses by the mere doing of the prohibited act, regardless of whether the violator intends the act or its consequence. The inclusion of the word "wilful" in this penal statute clearly shows that Con-

gress intended to punish only those persons who deliberately, intentionally and with bad motive, fail or refuse to give information to an Internal Revenue Agent. The inclusion of it made willfulness a vital part of the offense and imposed upon the prosecution the burden of proving that respondent's alleged offense was willfully done.

In the case of Potter v. U. S., 155 U. S. 438, the defendant, an official of a national bank, was charged with willfully certifying a check for a depositor who did not have on deposit sufficient money to pay the check. The Court said, in part:

> "The charge is a willful violation. That is the language of the statute. Section 5208, Revised Statutes, makes it unlawful for any officer of a national bank to certify a check unless the drawer has on deposit at the time an equal amount of money. But this section carries with it no penalty against the wrongdoing officer. Section 13 of the Act of 1882 imposes the penalty upon one 'who shall willfully violate,' etc., as well as upon one who shall resort to any device. * * * The word 'willful' is omitted from the description of offenses in the latter part of this section. Its presence in the first cannot be regarded as mere surplusage; it means something. It implies on the part of the officer knowledge and purpose to do wrong. Something more is required than an act of certification made in excess of the actual deposit, but in ignorance of the fact or without any purpose to evade or disobey the mandates of the law. The significance of the word 'willful' in criminal statutes has been

considered by this Court. In Felton v. U. S., 96 U. S. 699, at 702, it was said: 'Doing or omitting to do a thing knowingly and willfully implies not only a knowledge of the thing, but a determination with a bad intention to omit doing it. The word "willfully," says Chief Justice Shaw, "in the ordinary sense in which it is used in statutes, means not merely voluntarily, but with a bad purpose" ' (Com. v. Kneeland, 20 Pick. 220). 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse' (1 Bishop, Crim. Law, Sec. 428). * * * The testimony offered tended to show an agreement on the part of the officers of the bank to treat this overdraft as a loan, drawing interest and secured by collateral, and such agreement was carried into effect by the deposit of the collateral and the casting up of interest. If the defendant in good faith supposed that this arrangement was the equivalent of a loan by note, * * * it seems to us that the jury would have a right to be informed of the fact, as bearing upon whether he had 'willfully' violated the statute. * * * As 'willful' wrong is of the essence of the accusation, testimony bearing directly on the question is of vital importance, and error in rejecting it cannot be regarded as other than as material and manifestly prejudicial."

Because the question of whether respondent's refusal to answer questions constituted WILLFUL failure to supply information was one of the important fact issues in this case, the respondent was entitled to have the jury instructed upon this phase of the case. He was entitled to have the jury instructed that if his refusal to answer

questions, as shown by the evidence, was caused by his honest belief that his answers would incriminate him or subject him to a criminal prosecution, and that he believed this in good faith, that then he was not guilty of willfully failing to supply information as required by the statute and charged in the indictment. But he did not request the Court to charge the jury as strongly as here suggested. He did not request an instruction that in any way would direct a verdict or indicate what the jury's verdict should be. He merely requested the Court to charge the jury that if the jury believed that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon the defendant's actual belief the jury should consider that in determining whether the defendant's refusal to answer questions was willful. A willful wrong having been of the essence of the accusation and of vital importance in deciding upon the guilt or innocence of respondent, the refusal of the District Court to charge the jury as requested in respect to this phase of the prosecution cannot be construed as anything other than material and manifestly prejudicial error.

The decision of the Court of Appeals that the respondent was entitled to this instruction does not impair the vitality of the statute or obstruct its effective administration in any particular. The evidence in this record shows that respondent was represented by counsel at the hearing before the Internal Revenue Agent, and that he acted and

relied upon advice of counsel. It also shows that he refused to answer certain questions because advised to do so by his attorney and also because he actually believed that his answers would incriminate him. The jury, however, was not obliged to accept as true this explanation of his refusal to testify. We do not contend that the jury would have been in any manner bound by respondent's explanation. We merely submit the sensible and logical contention that the jury should have been instructed upon this question in order that it might intelligently pass upon the fact issue of whether respondent's refusal to answer questions was willful. As stated by the Court of Appeals in its opinion in this case:

> "True, the jury was not obliged to accept as true his explanation of his refusal to testify; for advice of counsel on such a question is not an absolute defense. A license to practice law does not carry with it the power to grant immunity to one not entitled to it. On the other hand, the issue of willfulness is ordinarily one of fact. * * * The good faith belief in advice given by counsel may, and ordinarily will, have a bearing upon willfulness of the conduct of a party who followed it. * * * Whether his asserted claim of protection is in good faith may be disputed, but a jury question is frequently thereby raised, at least in criminal cases, where willfulness of the accused's conduct is the fact issue, determinative of guilt, and the Court has expressed its opinion that the accused is guilty, the accused its entitled to an instruction which directs the jury's attention to his evidence on that issue" (62 F. [2d] 926).

It will probably be argued by the prosecution that the Fifth Amendment did not protect respondent from divulging facts which might subject him to criminal prosecution in a state court; that his claim of privilege upon this ground was ill-founded and was based upon ignorance of the law. It will probably be further argued that ignorance of the law is no excuse and will not protect the respondent in this case. As already stated, ignorance of the law is no excuse, but honest ignorance of the law, honestly asserted, may, and often will, constitute a fact to be considered in determining whether or not the act committed by the accused constituted a willful violation of the statute. Moreover, at the time respondent appeared before the Internal Revenue Agent and gave testimony, there was a conflict in the decisions of this Honorable Court upon the question of whether the Fifth Amendment protects one from incriminating himself or subjecting himself to criminal prosecution in a state court. The District Court that sustained respondent's special plea in bar at the first trial believed that the Fifth Amendment is sufficiently broad to protect one from giving incriminating evidence that might subject him to prosecution in a state court (51 F. [2nd] 389).

In an opinion by Justice Holmes in the case of Ballman v. Fagin, decided January 2, 1916, and reported at 200 U. S. 186, this Honorable Court said:

> "As we have said, he set forth that there were many proceedings on foot against him as party to a 'bucket shop' and so subject to the criminal law of the state

> in which the grand jury was sitting. According to U. S. v. Saline Bank, 1 Pet. 100, he was exonerated from disclosures which would have exposed him to the penalties of the state law."

In a case decided January 3, 1927, entitled U. S. ex rel. Vaj'tauer v. Commissioner of the Immigration, 273 U. S. 103, at 113, this Court, when confronted with the question of the right of one to avail himself of the Fifth Amendment in order to refuse to give information that might subject him to prosecution in a state court, did not decide the question, but said:

> "This conclusion makes it unnecessary for us to consider the extent to which the Fifth Amendment guarantees immunity from self-incrimination under state statutes or whether this case is to be controlled by Hale v. Henkel, 201 U. S. 43; Brown v. Walker, 161 U. S. 591; Compare U. S. Saline Bank, 1 Pet. 100; Ballman v. Fagin, 200 U. S. 186."

It was not until the opinion of this Honorable Court in this case, when it was heard before, as reported in 284 U. S. 141, that it was finally settled that one is not permitted to claim the protection of the Fifth Amendment as a reason for refusing to give information that might incriminate him in a state court.

We respectfully submit that respondent, a layman, unlearned in the law, could not be charged with ignorance of the law upon a question on which our courts of review had rendered conflicting opinions. He certainly could

not, under the circumstances, be charged with ignorance of law to such an extent that the trial court could hold, as a matter of law, that his conduct, dictated by ignorance of law, amounted to a willful disregard for and violation of the statute under which he was prosecuted.

In the petition for certiorari counsel for the Government contend that this case is controlled by the recent opinion of this Court in Sinclair v. U. S., 279 U. S. 263. The Sinclair case is not in any way applicable to this case. The law stated in the Sinclair opinion offers no assistance for the decision of this case. Sinclair was subpoenaed before a committee of the United States Senate and was asked certain questions concerning oil leases. He refused to answer the questions, but he did not base his refusal upon the contention that his answers might incriminate him. He expressly avowed his intention not to claim any protection under the Constitution. As stated in the Court's opinion: "He disclaimed any purpose to invoke protection against self-incrimination and asserted there was nothing in the transaction which could incriminate him." He boldly, deliberately and intentionally challenged the jurisdiction and the power of the committee, and called attention to the fact that the matter being investigated was one to be investigated in certain litigation then pending in court, and he said: "I shall reserve any evidence I may be able to give for those courts to which you and your colleagues have de-

liberately referred all questions of which you had any jurisdiction and shall respectfully decline to answer any questions propounded by your committee."

His refusal to answer was deliberate and premeditated and constituted a willful and intentional contempt of the Senate committee. He offered no extenuating facts that might be construed as showing that his refusal to answer was made in good faith or under an honest but mistaken understanding of fact.

Moreover, the statute under which he was prosecuted made the mere refusal to testify an offense. The mere doing of it constituted the crime. Congress did not make willfulness an ingredient of that offense. The statute under which he was prosecuted (U. S. C. A., Title 28, Sec. 102) says:

> "Every person who, having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before either House, or any committee of either House of Congress, * * * who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor," etc.

Because the statute under which Sinclair was prosecuted did not include the word "willfully," the Sinclair case is not pertinent and it sheds no light upon the question here presented.

Counsel for the prosecution have reversed the position they adopted at the trial in their present contention that a complete case was made against respondent by showing that he refused to answer questions, and in their further contention, now made for the first time, that the Government was not required to prove that defendant's conduct was willful and that the defendant, therefore, was not entitled to an instruction on the defense of good faith or honest belief. At the trial the prosecution offered two witness, Waterbury and Keyes (R. 37 and 41), by whom they proceeded to show that these witnesses held a meeting with respondent at East St. Louis, Illinois, several months prior to the date on which the respondent was summoned to appear before Internal Revenue Agent Kirk, and that in that meeting respondent refused to answer certain questions concerning his income for the years 1927 and 1928. Respondent was under no legal duty to answer the questions propounded to him by agents Waterbury and Keyes at the meeting at East St. Louis. He was not charged in the indictment with having refused to answer questions asked by these gentlemen. He was only charged with refusal to answer the questions propounded by Internal Revenue Agent Kirk on January 9, 1930. For this reason, counsel for respondent objected to this testimony, but the objection was overruled (R. 37-38). When the objection was interposed, the District Attorney representing the Government at the trial said: "There is a question of willfulness here, and that is why I think it is material" (R.

38). Here is an admission of the prosecution, made at the trial, that proof of willfulness was a necessary burden cast upon the prosecution by this statute. Here was an admission that states that whether respondent's conduct amounted to a willful failure to supply information constituted one of the vital fact issues in the case. If this was a vital fact issue in the case, respondent was entitled to an instruction upon this question advising the jury that if they believed from the evidence that respondent's refusal to answer was made in good faith and was based upon his honest belief, the jury should consider that in determining whether his refusal to answer the questions was willful, and the refusal of the District Court to thus instruct the jury as requested by respondent constituted reversible error.

The damage that was done to respondent's right to a fair trial and to have the jury properly advised of the law controlling the case, through the refusal of the District Court to give the requested instruction, is emphasized by the following part of the Court's charge: "The Court feels from the evidence in this case that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt" (R. 66).

This instruction advised the jury that the defendant had been proved guilty of a willful violation of the statute beyond any reasonable doubt. It completely and forever

swept away any defense that respondent may have had. It dispensed with the necessity of a jury trial.

The Court, in giving this instruction, substituted its opinion for that of the jury's and deprived the respondent of his constitutional right to a trial by jury. This instruction settled the issue of willfulness against respondent, and withdrew from the jury its right to consider this important question.

This instruction was not a comment upon the facts, made in order to assist the jury in construing or interpreting the evidence. It was a mandatory instruction upon the ultimate fact to be determined by the jury.

When this instruction is considered in conjunction with the refusal of the Court to give the instruction requested by respondent on the question of good faith, we respectfully submit that no other conclusion can be reached than that respondent was deprived of a fair trial. Whether respondent is guilty or innocent of the charge appearing in this indictment is a question to be decided by a jury after it has been correctly advised by the Court of the applicable law. Whether respondent is guilty or innocent in this case, he was entitled to a fair trial in accordance with the law of the land. As stated by the Supreme Court of Illinois in the case of People v. Garines, 314 Ill. 413:

> "Although there may be enough evidence in a record to justify a conviction, the defendant has a right to a trial by jury and not by this Court. He has a

right to be tried in accordance with the law of the land, and a conviction secured in total disregard of that law cannot be sustained. The law does not provide one method for trying innocent persons and another for trying guilty persons."

For the reasons herein presented, we respectfully submit that the decision of the United States Circuit Court of Appeals for the Seventh Circuit reversing the judgment of the District Court and remanding this cause for another trial is correct, and should be affirmed.

Respectfully submitted,

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APPENDIX.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fifth Amendment to the Constitution provides:

No person * * * shall be compelled, in any criminal case, to be a witness against himself. * * *

Revenue Act of 1926, c. 27, 44 Stat. 9, 50, 113, 116:

Sec. 256. All persons, in whatever capacity acting, including lessees or mortgagors of real or personal property, fiduciaries and employers, making payment to another person, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments, or other fixed or determinable gains, profits and income, * * * shall render a true and accurate return to the Commissioner, under such regulations and in such form and manner and to such extent as may be prescribed by him with the approval of the Secretary, setting forth the amount of such gains, profits and income, and the name and address of the recipient of such payment.

* * * * * * *

When necessary to make effective the provisions of this section the name and address of the recipient of income shall be furnished upon demand of the person paying the income. * * *

(U. S. C. App., Title 26, Sec. 1023.)

Sec. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose

of making a return where none has been made, is hereby authorized, by any revenue agent or inspector designated by him for that purpose, to examine any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return, or of any officer or employe of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons (U. S. C. App., Title 26, Sec. 1247).

Sec. 1114. (a) Any person required under this act to pay any tax, or required by law or regulation made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment or collection of any tax imposed by this act, who willfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

* * * * * * *

(U. S. C., Title 26, Sec. 1265.)

Revenue Act of 1928, c. 852, 45 Stat. 791, 836, 878:

Sec. 148. (This section is identical with Section 256 of the 1926 Act, above quoted.)

Sec. 618. EXAMINATION OF BOOKS AND WITNESSES.

Section 1104 of the Revenue Act of 1926 is amended to read as follows:

"Sec. 1104. The Commissioner, for the purpose of ascertaining the correctness of any return or for the purpose of making a return where none has been made, is hereby authorized, by any officer or employe of the Bureau of Internal Revenue, including the field service, designated by him for the purpose, to examine any books, papers, records or memoranda bearing upon the matters, and may require the attendance of the person rendering the return, or of any officer or employe of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons."

Sec. 146. (a) (This section is identical with section 1114 (a) of the 1926 Act above quoted, except that the word "title" is substituted for "act" in the two instances in which the latter word is used in the 1926 Act.)